National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 6, 1998

TO: William C. Schaub, Regional Director, Region 7

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Schober Printing Co., Case 7-CA-40872

530-4080-5012-6700

This Section 8(a)(5) case was submitted for advice on whether the Employer lawfully withdrew recognition based upon knowledge that a majority of unit employees no longer wished to be represented by the Union.

Over 20 years ago, the Employer voluntarily recognized the Union in a unit of two truck drivers. In 1993, the Employer eliminated one full-time truck driver who thereafter worked as a fill-in during absences of the remaining driver. Some of those absences were for extended periods of time. The fill-in driver was paid wages under the current bargaining agreement and also allowed to file grievances, the most recent of which was in February 1998. The Union therefore claims that the unit still consists of two employees.

In December 1997 and January 1998, the full-time driver clearly indicated to both the Employer and the Union that he no longer wished to be represented by the Union. When the current bargaining agreement expired on March 31, 1998, the Employer declined to negotiate with the Union. On June 22, the Employer filed an RM petition which is blocked by the instant charge.

The Region should dismiss the charge and process the RM petition.

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of the certification year or a contract, an employer may withdraw recognition if either the union has in fact lost majority support, or the employer has a good-faith doubt of the union's majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations.(1)

In Chelsea Industries,(2) the General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "good faith" doubt standard should be overturned. The General Counsel argued that the Celanese rule encourages employers to engage in self-help measures which undermine the Supreme Court's view that, "even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief."(3) Thus, the General Counsel argued that a secret-ballot election should be the only means by which a Section 9(a) representative's presumption of majority status can be rebutted.

We conclude that it would not be appropriate in this case to issue complaint solely on the General Counsel's alternate theory in Chelsea Industries, particularly in view of the Board's recent pronouncement in Auciello. The Employer here had knowledge of the loss of majority status, and the Board currently permits an employer to withdraw recognition on this basis. Thus, there is no argument under current Board law supporting a violation. Furthermore, retroactive application of any new rule of law announced in Chelsea would be uncertain. Thus, under the law as it now stands, this case should be disposed of in accord with the long standing practice of General Counsels to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year or after expiration of a contract in circumstances where the union has in fact lost majority status among unit employees without any unlawful interference by the employer.(4)

Accordingly, the Region should dismiss this Section 8(a)(5) charge, absent withdrawal. Further, consistent with the General Counsel's position in Chelsea Industries, the Region should continue processing the Employer's RM petition.

B.J.K.

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[1] **This principle was recently noted by the Board in Auciello Iron Works, 317 NLRB 364 (1995), on remand from 980 F.2d 804 (1st Cir. 1992).**

[2] **Cases 7-CA-36846 et al.**

[3] **Brooks v. NLRB, 348 U.S. 96, 104 n.18 (1954). See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987) (allowing employers to rely on employees' rights in refusing to bargain is inimical to industrial peace) (dictum).**

[4] **See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.**